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SUPREME COURT OF THE UNITED STATES

No. 1031

CAPITOL AIRWAYS, INC.,
Petitioner,

vs.

THE AIRLINE PILOTS ASSOCIATION INTERNATIONAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUDSON HARWOOD,
515 Nashville Bank & Trust Building,
Nashville, Tennessee,
Attorney for Capitol Airways, Inc.

R. L. MERRIHEW, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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Petitioner, Capitol Airways, Inc., a Tennessee corporation engaged in business as an air carrier in both domestic and international air service pursuant to authority issued by the Civil Aeronautics Board, prays that the Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Sixth Circuit entered on February 10, 1965.

The said decision holds that a decision of a System Board of Adjustment created by collective bargaining contract pursuant to the mandate of Section 184, Title 45, U.S.C. must be enforced by the Federal District Courts if the collective bargaining contract is susceptible of the interpretation placed upon it by said Board.

Since air carriers and their employees are governed by the Railway Labor Act (Sections 151-188, Title 45, U.S.C.), Petitioner insisted below and here insists that it is the duty of Federal District Courts in reviewing decisions of System Boards of Adjustment to go further and make an independent interpretation of the legal obligations and rights of the parties.

OPINIONS BELOW

The opinion of the Court of Appeals is copied in the Appendix hereto at page A1.

The opinion of the District Court is copied in the Appendix hereto at page A4.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

The District Court is given jurisdiction by Section 1337, Title 28, U.S.C. and Section 2201, Title 28, U.S.C.

QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, air carriers are entitled to receive the same scope of judicial review of decisions of System Boards of Adjustment as rail carriers receive in actions to review decisions of divisions of the Adjustment Board. Petitioner insists that the answer should be "yes".

2. Whether the failure to provide for Judicial review of an order of a System Board of Adjustment is a denial of Due Process where the Air Carrier is compelled by statute

to enter into an agreement creating such System Board. Petitioner insists that the answer should be "yes".

3. Whether a Federal District Court, in reviewing an order of a System Board of Adjustment created by a collective bargaining contract pursuant to the Railway Labor Act, is required to make an independent interpretation of the legal obligations of the parties under the contract. Petitioner insists that the answer should be "yes".

4. Whether an airline may be required to reemploy and pay lost wages to a discharged pilot who has not been "exonerated" by the System Board of Adjustment where the only contract provision dealing with the reemployment of the discharged pilot provides "If as a result of any hearing as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period". Petitioner insists that the answer should be "no".

5. Whether an airline may be required by a System Board of Adjustment to reemploy a captain pilot who was discharged for attempting to smuggle goods into the United States aboard the aircraft, where the said System Board of Adjustment found that said captain was, in fact, guilty of attempted smuggling, where the only provision of the collective bargaining contract dealing with the reemployment of the discharged pilot provides, "If as a result of any hearing—a pilot is exonerated—he shall be reinstated". Petitioner insists that the answer should be "no".

STATUTES INVOLVED

Title 45, U.S.C., Sections 151-188, are the applicable statutes. Section 181 makes all of the earlier sections of the Railway Labor Act applicable to air carriers except Section 153. Section 184, however, provides:

> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title to establish a board of adjustment *of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment under the authority of section 153 of this title.*" (Emphasis added)

"Section 153 referred to in the above quoted statute, ¶ (p) states:

> If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. *Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated. . . . The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.*" (Emphasis added)

STATEMENT OF THE CASE

Petitioner is an airline operating in both domestic and international air service. A number of years ago, respondent was certified as the bargaining agent for Petitioner's pilots. This certification was made by the National Mediation Board under the provisions of the Railway Labor Act (Sections 181-188, Title 45, U.S.C.) After certification a collective bargaining contract was entered into between the parties and said contract has been renewed from time to time, although the renewals did not change the general provisions of the contract.

As a part of said collective bargaining contract and pursuant to the requirements of Section 184, Title 45, U.S.C., a System Board of Adjustment was created for the purpose of settling disputes which may arise between the parties under the collective bargaining contract.

Prior to the decision of this Court in *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 10 L. Ed. 2d 67, disputes involving four former pilots of Petitioner had been submitted to the System Board of Adjustment and said System Board had entered various Orders on behalf of said individuals as follows:

1. Pilot Hull was a Captain of a Trans-Oceantic Airliner, and on a flight from Frankfort, Germany, attempted to smuggle two valuable musical instruments into the United States without paying the applicable tax. These instruments were packed in a carton which was labeled "Spare Parts". The instruments were discovered by the Customs officials and when Hull realized the instruments had been discovered he persuaded one of the stewardsses who had not yet cleared Customs to list the instruments on her Declaration Form. Hull was discharged

after Petitioner investigated the matter and concluded that Hull had attempted to smuggle the instruments into the United States.

The System Board of Adjustment expressly found that Hull was in fact guilty of attempted smuggling. In so doing, the Board stated:

> "There is no question in my mind that Hull did attempt to smuggle or bring the instruments into the country without paying duty on them. Every bit of evidence points in this direction." (Appx. 69a)

The System Board also expressly quoted the pertinent or cited contract clauses and rules and regulations. (Appx. 60a)

The only contract provision quoted or cited by the System Board is Section 26 which is the only section in the contract in which Petitioner agreed to re-employ a discharged pilot. Sec. 26(c)(4) states:

> "If as a result of any hearing or appeal therefrom as herein provided, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period."

Notwithstanding this clear provision of the contract and without citing or referring to any other provision of the contract or attempting to construe any other provision of the contract as authorizing such action, the System Board ordered Petitioner to re-employ Hull but without back pay.

Petitioner insisted below and insists here that when the System Board failed to exonerate Captain Hull it had no authority to require Petitioner to re-employ him. Peti-

tioner insisted below and insists here that its obligation under the contract is not a severable obligation but is entire and that the System Board must either exonerate the pilot and thereby order him reinstated with back pay or it must, as a matter of law, sustain his discharge. The System Board is not authorized to compromise the dispute and substitute its own brand of industrial justice.

2. Pilot Gerhard was discharged and the record in this case is not so full as that in the Hull case. The entire decision of the System Board is as follows:

> "That Robert M. Gerhard be given a disciplinary layoff of three months, after which he should be reimbursed for the time lost on the basis of his average earnings for the three months period prior to December 20, 1960, less his earnings during the period after the expiration of layoff of three months. After the layoff of three months Gerhard shall be reinstated with all rights." (Appx. 80a)

It should be noted that, in addition to ordering Gerhard re-employed, a money award was made.

3. *Carlin*—The record in the Carlin case also is not as detailed as in the Hull case. The decision of the System Board states:

> "Yes, the discharge was justified, but the penalty imposed was too severe and he should have been suspended for a period of time instead of a complete dismissal". (Appx. 78a)

In this case the District Court, however, refused to enforce the award on the ground that the System Board expressly found that the question of discharge was not timely raised. The Court of Appeals, however, reversed the District Court in this regard holding that questions of procedure are exclusively within the province of the Board.

Petitioner's position in this case is the same as in the Hull and Gerhard cases, that is, the pilot was not only not exonerated, but the award shows clearly that he was guilty of substantial misconduct.

Petitioner, however, further insists in the Carlin case that the System Board award on its face shows that the requirements with reference to the timeliness of filing the grievance was not met.

Shortly after his discharge, Carlin filed his claim on May 3 and this claim only involved certain sums of money he claimed were due him. This item was settled, but on November 6 he amended his claim to include for the first time the question of his discharge. The question of discharge was not raised within the time provided in the contract. In this regard the System Board stated:

> "This Board is inclined to feel that there was an improper attempt to correct the letter of May 3 and that the letter of November 6 was filed out of time and cannot be given consideration. No satisfactory explanation was made to this Board at the hearing, although repeated efforts were made to obtain an explanation. The Board feels that this was outside the time limit by injecting new material into the controversy after the time had expired." (Appx. 78a-79a)

Since the System Board found as a fact that the question of discharge was not raised within the time limit set by the contract, Petitioner insisted and the District Court found that the System Board was without jurisdiction to hear the dispute.

4. Former Pilot Riley was awarded $4,800.00.

Shortly after the decision of this Court in *International Association of Machinists* v. *Central Airlines, supra*, Petitioner filed suit in the Federal District Court challenging the validity of the four awards.

Respondent filed an answer and counterclaim seeking enforcement of the four awards.

Both parties made motions for summary judgment and the District Court granted Petitioner's motion as to the Carlin and Riley awards and granted Respondent's motion as to the Hull and Gerhard awards.

Capitol duly perfected its appeal to the United States Court of Appeals for the Sixth Circuit whereupon Respondent filed a cross-appeal.

The Court of Appeals sustained the action of the District Court in the Hull, Gerhard and Riley cases but reversed the District Court in the Carlin case.

Under the present state of the record, therefore, Petitioner is required to comply with the awards in the Hull, Gerhard and Carlin cases and although the Carlin case involved a procedural matter which was different from any matter applicable to the other cases, the real question in issue is the same in all three cases. In each of the three cases the System Board of Adjustment failed to exonerate the pilots of the misconduct leading to their discharge and it is the insistence of the Petitioner that it has no obligation to reemploy or pay lost wages to discharged pilots who are not exonerated in accordance with the clear language of the contract.

In disposing of the case, neither the District Court nor the Court of Appeals at any point cited, mentioned or relied upon the Railway Labor Act or any decision arising thereunder although Air Carriers are expressly made subject to that Act.

Neither the District Court nor the Court of Appeals found or held that the decisions of the System Board were in accordance with the correct legal interpretation of the

contract but merely that the contract was *susceptible* to such interpretation. In this regard the Court of Appeals stated:

> "In our opinion, the arbitration cause of the collective bargaining agreement was susceptible of the interpretation placed upon it by the Board and the district judge was right in sustaining the Board."

Petitioner insists that it was the duty of the District Court to make an independent interpretation of Petitioner's obligations under the contract and it was error for the Court to limit its consideration as was done.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is in conflict with the decision of this Court in the case of *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 10 Law Edition 2d 67.

2. The Court of Appeals in this case has decided an important question of Federal law which has not but should be expressly and specifically settled by this Court.

3. The decision of the Court of Appeals in this case is in conflict with decisions of Courts of Appeals for other Circuits as follows:

1. *Washington Terminal Company* v. *Boswell*, 124 F.2d 335 (Affirmed by this Court 319 U.S. 733).

2. *Brotherhood, etc.*, v. *Atlantic Coast Line R. Co.*, 253 F.2d 753 (Court of Appeals for the Fourth Circuit).

3. *Dahlberg* v. *Pittsburgh and L. E. R. Co.*, 138 F.2d 121 (Court of Appeals for the Third Circuit).

4. *Jones* v. *Central of Georgia Railway Company*, 331 F.2d 649 (Court of Appeals for the Fifth Circuit).

In all of the foregoing cases the Courts of Appeals specifically held that it was the duty of the District Courts in reviewing orders under the Railway Labor Act to consider the merits of the cases and not to restrict the scope of review as was done by the Court of Appeals in the instant case.

ARGUMENT

QUESTIONS 1 AND 3

(1) Whether, under the Railway Labor Act, air carriers are entitled to receive the same scope of judicial review of decisions of System Boards of Adjustment as rail carriers receive in actions to review decisions of divisions of the Adjustment Board. Petitioner insists that the answer should be "yes".

(3) Whether a Federal District Court, in reviewing an order of a System Board of Adjustment created by a collective bargaining contract pursuant to the Railway Labor Act, is required to make an independent interpretation of the legal obligations of the parties under the contract. Petitioner insists that the answer should be "yes".

It is undisputed that the contract between the parties hereto was entered into in compliance with the Mandates of Section 184, Title 45, U.S.C.

In regard to the creation of the System Board of Adjustment by the parties, the contract specifically provides "In compliance with Section 204, Title 2, of the Railway Labor Act, as amended, there is hereby established a System Board of Adjustment—" (Appx. 47a)

This Court in the *Central Airlines* case, *supra*, repeatedly referred to the requirements of the Railway Labor Act. In the course of the opinion the Court stated:

"In 1936, Congress extended the Railway Labor Act to cover the then small-but-growing air transportation industry. 49 Stat. 1189, 45 U.S.C., §§ 181-188. Its general aim was to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry. But there was to be a significant variation. The 1936 amendments made applicable to the airlines all of the provisions of the Railway Labor Act, excepting § 3, 45 U.S.C., § 153, dealing with the National Railroad Adjustment Board; but including § 1, 45 U.S.C., § 151, containing definitions; § 2, 45 U.S.C., § 152, the Act's statement of purposes; §§ 4 and 5, 45 U.S.C., §§ 154, 155, relative to the National Mediation Board and its functions; and §§ 7, 8 and 9, 45 U.S.C., §§ 157-159, relating to voluntary arbitration and emergency boards. § 202, 45 U.S.C., § 182. In the place of § 3, Congress provided in § 205, 45 U.S.C., § 185, that the creation of a National Air Transport Board would be postponed until 'in the judgment of the National Mediation Board, it shall be necessary to have a permanent board of adjustment. . . .' Until the establishment of the national board for the airlines industry, § 204, 45 U.S.C., § 184, required the formation of system, group, or regional boards of adjustment:

'It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of *jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.*' (Emphasis added)

The duty imposed upon the parties to create adjustment boards to settle grievances was more than a casual suggestion to the air industry. The original version of S. 2496, which, as amended, became law, provided for voluntary boards of adjustment as in the case of the railroads and extended the jurisdiction of the National Mediation Board to minor as well as

major disputes. But upon the suggestion of the National Mediation Board, its jurisdiction was not expanded, and the law as finally passed *made compulsory the establishment of the adjustment boards.* Until and unless the National Mediation Board determined to create a national board, the parties were placed under the statutory duty of establishing and utilizing system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes arising under existing contracts. (Emphasis added)

The obligation which § 204 fastened upon the carriers and their employees cannot be read in isolation. Its true significance must be drawn from its context as part of the Railway Labor Act which itself draws meaning from its history."

The Court further stated:

"In view of the clearly stated purposes of the Act and of its history, reflecting as it does a steady congressional intent to move toward a reliable and effective system for the settlement of grievances, *we believe Congress intended no hiatus in the statutory scheme when it postponed the establishment of a National Air Transport Adjustment Board and instead provided for compulsory system, group, or regional boards.* Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act." (Emphasis added)

The Court further stated:

"More specifically, the provisions of a § 204 contract, such as those governing the composition of the adjustment board, the procedures to be employed as

to notice and hearing or for breaking deadlocks, *or the finality to be accorded board awards, are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme.*" (Emphasis added)

The Court further stated:

"The Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.' *Bower* v. *Eastern Airlines, Inc.*, 214 F.2d 623, 626 (C.A. 3d Cir.); *Washington Terminal Co.* v. *Boswell*, 75 App. D.C. 7, 124 F.2d 235, 244."

The Court further stated:

"Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose."

45 U.S.C. 184 compels the creation of a board of adjustment "of jurisdictions not exceeding jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment under the authority of section 153 of this title."

If the scope of review of system board awards is more limited than decisions of adjustment boards in railway cases, then this necessarily enlarges their jurisdiction contrary to the express provision of the Statute.

That Congress intended the same scope of review in Air Carrier cases is further demonstrated by the provisions of 45 U.S.C. 185. In regards the National Air Transport Adjustment Board said section provides:

> ". . . hearings shall be held, findings and awards *made, stated served, and enforced,* and the number and compensation of any necessary assistants shall be determined and the compensation of such employees shall be paid, *all in the same manner and to the same extent as provided with reference to the National Railroad Adjustment Board by section 153 of this title.*" (Emphasis added)

From the foregoing Petitioner respectfully insists that this Court has in fact already ruled that the same rules for enforcement of System Board of Adjustment awards as are applicable in the railway industry apply to Air Carriers cases but since the Court did not by express terms so rule, Petitioner insists that the Court should now accept jurisdiction of this case and specifically spell out for the air industry just what scope of review it is entitled to receive from the Federal District Courts. This Court only recently in *Central Airlines* cleared the confusion of the Federal jurisdiction in such cases and should now go further and spell out the procedures applicable because this is a matter which will of necessity arise numerous times in the now vast air industry which is in operation throughout the entire United States.

Petitioner further insists that this Court should expressly rule that Air Carriers are entitled to exactly the same scope of review in District Courts as rail carriers are afforded under 45 U.S.C. 153 and that such review requires an independent interpretation of legal obligations under the contract.

QUESTION 2

(2) Whether the failure to provide for Judicial review of an order of a System Board of Adjustment is a denial of Due Process where the Air Carrier is compelled

by statute to enter into an agreement creating such System Board. Petitioner insists that the answer should be "yes".

If decisions of a System Board of Adjustment are binding on the courts as to either law or fact then the statute would be unconstitutional. It must be remembered that the System Board is not a public or governmental agency but is a private agency created pursuant to the statutory mandate. To permit such an agency to make either findings or fact or legal determinations final and binding is a denial of due process because neither the System Board nor the procedures before such Board afford even the most basic requirements of due process.

In *Washington Terminal Company* v. *Boswell*, 124 F.2d 235, affirmed 319 U.S. 733, the Court of Appeals stated:

> "Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, *if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law.* But, as has *been shown, they have no such quality.*" (Emphasis added)

The Court further stated:

> "The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

To the same effect the Court of Appeals for the Third Circuit in *Dahlberg* v. *Pittsburgh, etc.*, 138 F.2d 121, stated:

> "If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in *Washington Terminal Co.* v. *Boswell,* 75 U.S. App. D.C. 1, 124 F.2d 235, 276, 'There can be no valid delegation of governmental power to non-governmental agencies. *Carter* v. *Carter Coal Co.*, 1936, 298 U.S. 238. The Adjustment Board, consisting of bipartisan groups paid by and set up to represent the employees and carriers respectively, is not a governmental agency.' "

It must be remembered that the creation of the System Board of Adjustment and the agreement relative thereto are not the results of a private voluntary agreement but are the result of a mandatory requirement of the Act. Therefore, the decisions arising under the Labor Management Relations Act regarding arbitration disputes have no bearing whatever in this case because in those cases the arbitration agreement was the voluntary act of the parties rather than the result of a statutory requirement.

As pointed out in the decisions above quoted, the statutory compulsion of settlement of disputes without the right to full judicial review raises very serious questions of constitutional law.

This Court has held in numerous cases that in construing a statute the Court will avoid a construction which even raises a serious question of constitutional law. In this regard in *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 81 L. Ed. 1143, the Court stated:

> "We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.' *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 307, 68 L. Ed. 696, 701, 44 S. Ct. 336, 32 A.L.R. 786; *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 390, 68 L. Ed. 748, 754, 44 S. Ct. 391; *Blodgett* v. *Holden*, 275 U.S. 142, 148, 72 L. Ed. 206, 210, 48 S. Ct. 105." (301 U.S. 351, 352)

Certainly a construction of the statute which requires a carrier to enter into an agreement for the establishment of a System Board of Adjustment and which makes findings of said Board final and binding without regard to the fact that such Boards are not composed of lawyers, do not follow legal procedures as to pleadings and evidence and which completely ignore all basic principles of contract construction would clearly be violative of due process guaranteed under the Fifth Amendment. A construction, however, which affords full judicial review of the orders of such System Boards of Adjustment, certainly as to legal questions, would eliminate the constitutional question.

Petitioner, therefore, respectfully insists that for the Courts to limit the scope of review of orders of System Boards of Adjustment as was done in the cases now before this Court is a denial of due process. If such is the real intent of the statute then the entire statute is unconstitutional but if a full and complete judicial review is afforded then the statute is constitutional and valid.

QUESTIONS 4 AND 5

(4) Whether an airline may be required to reemploy and pay lost wages to a discharged pilot who has not been "exonerated" by the System Board of Adjustment where the only contract provision dealing with the reemployment of the discharged pilot provides "If as a result of any hearing as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he been continued in service during such period." Petitioner insists that the answer should be "no".

(5) Whether an airline may be required by a System Board of Adjustment to reemploy a captain pilot who was discharged for attempting to smuggle goods into the United States aboard the aircraft, where the said System Board of Adjustment found that said captain was, in fact, guilty of attempted smuggling, where the only provision of the collective bargaining contract dealing with the reemployment of the discharged pilot provides, "If as a result of any hearing—a pilot is exonerated—he shall be reinstated." Petitioner insists that the answer should be "no".

The contract between the parties hereto has only one section which in any way directly or indirectly discusses or even mentions the obligation of petitioner to reemploy a pilot who has been discharged. This section is Section 26. (Appx. 34a) The only portion of this section which in any way contains a promise to reemploy is Sub-Section c(4) and reads as follows:

> "If as a result of any hearing or appeal therefrom as provided herein, a pilot is exonerated, he shall, if he has been held out of service, be reinstated without loss of seniority and shall be paid for such time lost in

> an amount which he would have ordinarily earned had he been continued in service during such period." (Appx. 36a)

It will be noted that this obligation is entire and not severable and there is no way this section can be construed to give a System Board authority to fail to exonerate a pilot of substantial misconduct and yet compromise the dispute by ordering him re-employed but without back pay.

Neither the District Court nor the Court of Appeals at any point or place held that a proper construction of the contract would give the System Board authority to do what it did in these cases but merely held that the contract was susceptible to such interpretation.

Neither the District Court nor the Court of Appeals cited or in any way referred to any decision arising under the Railway Labor Act but relied solely upon decisions dealing with arbitration cases arising under Section 301 of the Labor Management Relations Act.

Petitioner insists that this alone was error because the parties hereto are governed by the Railway Labor Act. Furthermore, the provision of the contract creating the System Board states that it is made in compliance with Section 204, Title II (45 U.S.C. 184) (Appx. 47a) and also provides:

> "Nothing herein shall be construed to limit, restrict or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provisions of the Railway Labor Act, * * *" (Appx. 51a)

Without waiving the foregoing, petitioner insists that the decisions of this court do not support the conclusions reached by the lower courts.

On June 20, 1960 this court decided three cases dealing with enforcement of arbitration agreements. These cases are *United Steel Workers* v. *American Manufacturing Co.*; *United Steel Workers of America* v. *Warrior, etc.*; and *United Steel Workers* v. *Enterprise*. All of these cases are reported in 4 L. Ed. 2d beginning at page 1403, and in 363 U.S. beginning at page 564.

The District Court quoted from the *Warrior* case (Appx. 157a) as follows:

> "An order to arbitrate the particular grievance [contracting out work] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of the interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." At page 582.

It will be noted that this case involved an order to arbitrate and not the enforcement of an arbitration award.

The only one of the decisions which involved enforcement of an award is the *Enterprise* case. In that case, however, the court stated:

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*" (Emphasis added)

It will be noted that this court has never said that a court must enforce an arbitration award that is contrary to the plain provisions of the contract. If the contract is susceptible of an interpretation reached by the arbitrator

using fundamental basic principles of contract construction, then the court should enforce, but the court should not ignore such legal construction principles in determining whether the contract is susceptible of the arbitrator's interpretation. If this is not true, then no one can draw a contract and know what it means.

In the case now before the Court, it is necessary to ignore all basic principles of contract construction in order to reach the conclusion that the awards are valid because:

1. Section 26 of the contract precedes Section 27 which was referred to by the District Court (Appx. 158a) as authorizing the awards.

2. Section 26 deals specifically with discipline and discharge while Section 27 merely provides:

> "Any pilot or group of pilots covered by this Agreement who have a grievance concerning any action of the Company affecting them, not settled in conference with Company officials, shall be entitled to have such grievance handled in accordance with the procedure established in Section 26 hereof for investigation and hearing or appeal." (Appx. 37a)

It will be noted that even Section 27 expressly refers to Section 26 and does not pretend to negative the conditional requirements of Section 26.

3. The only promise to re-employ is a conditional promise starting with the word "If".

The distinction between this case and the Steel Workers cases is clearly illustrated by a statement in the separate opinion reported at 363 U.S. 569. There the opinion states:

> "* * * for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no com-

pulsion in law requiring them to include any such promise in their agreement."

Here there is "compulsion in law" to create the System Board.

CONCLUSION

Petitioner most respectfully insists that the lower courts erred in failing to apply the same scope of judicial review as is applicable in railroad cases under the Railway Labor Act.

The lower courts also misconstrued the decisions of this Court in labor arbitration cases arising under the Labor Management Relations Act.

Petitioner also most respectfully insists that the scope of judicial review in airline cases involves a very important question affecting the entire air industry and should be settled by a decision of this Court.

Petitioner further respectfully insists that the decisions of the lower courts are erroneous and should be reversed.

Respectfully submitted,

JUDSON HARWOOD,
515 Nashville Bank & Trust Building,
Nashville, Tennessee,
Attorney for Capitol Airways, Inc.